Sotomayor, Circuit Judge, concurring in part and dissenting in part:

I concur with the majority's holding that the second, third, and fifth searches of S.C. and the second search of T.W. were unlawful. Absent an individualized basis to believe that the plaintiffs had acquired contraband while in custody of the authorities, these re-entry searches violated Fourth Amendment standards of reasonableness. With respect to the sixth and seventh searches of S.C., I concur with the majority's decision to remand to the district court to make factual findings as to the existence of reasonable suspicion. I also agree that the denial of class certification was well within the district court's discretion.

I dissent, however, from the Court's decision to uphold the first, fourth, and eighth strip searches of S.C. and the first strip search of T.W. Our caselaw consistently has recognized the severely intrusive nature of strip searches and has placed strict limits on their use. The concerns animating our prior rulings in this area should be only heightened when the privacy interests of emotionally troubled children are at stake. Here, the government has failed to demonstrate that its special needs should overcome these concerns and allow for strip searches, in the absence of individualized suspicion, of adolescents who have never been charged with a crime. Accordingly, I would find that, regardless of whether the suspicionless strip searches occurred upon entry or re-entry, they were unlawful.

I agree with the majority that the proper framework for analysis of the strip searches at issue is the "special needs" balancing test of *Board of Education v. Earls*, 536 U.S. 822, 829 (2002), rather than the *Turner* standard for penal institutions, *Turner v. Safley*, 482 U.S. 78, 89 (1987). The source of my disagreement with the majority lies in the application of the balancing

test to the facts before us. In my view, the government has not demonstrated adequately that the highly invasive suspicionless strip searches bore a "close and substantial relationship to the government's special needs." *United States v. Lifshitz*, 369 F.3d 173, 186 (2d Cir. 2004) (internal quotation marks omitted).

A.

As the majority observes, strip searches – as compared to other kinds of searches – "instinctively give[] us the most pause." *Bell v. Wolfish*, 441 U.S. 520, 558 (1979). We have called a strip search "a highly intrusive invasion," *Rivera v. United States*, 928 F.2d 592, 607 (2d Cir. 1991) (citation and internal quotation marks omitted), "an extreme intrusion upon personal privacy," *Burns v. Loranger*, 907 F.2d 233, 235 n.6 (2d Cir. 1990), and "an offense to the dignity of the individual," *id*. We hardly have been alone in this assessment. The Eleventh Circuit has accepted as "axiomatic that a strip search represents a serious intrusion upon personal rights." *Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992). The Seventh Circuit has referred to strip searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (citation and internal quotation marks omitted). Other courts have reached similar conclusions. *See Roe v. Texas Dep't of Protective & Regulatory Serv.*, 299 F.3d 395, 404, 405 & n.11 (5th Cir. 2002); *Roberts v. Rhode Island*, 239 F.3d 107, 110 (1st Cir. 2001); *Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1446 (9th Cir. 1989); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982); *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980) (per curiam);

Flores v. Meese, 681 F. Supp. 665, 667 (C.D. Cal. 1988), *rev'd on other grounds*, *Reno v. Flores*, 507 U.S. 292 (1993).

We should be especially wary of strip searches of children, since youth "is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *see also Flores*, 681 F. Supp. at 667 ("Children are especially susceptible to possible traumas from strip searches."). When officials are dealing with children who may be victims of sexual abuse, the concerns are even greater. *See ante*, at **[16 n.10]**.

The case before us presents facts that provoke all of our typical concerns about strip searches. The detention facility officers on numerous occasions ordered appellants – troubled adolescent girls facing no criminal charges – to remove all of their clothes and underwear. The officials inspected the girls' naked bodies front and back, and had them lift their breasts and spread out folds of fat. The young girls described the process as embarrassing and humiliating. Indeed, T.W. cried throughout one of her searches. During one of S.C.'s searches, two other detainees were present. The juvenile detention facilities perform similar searches on every girl who enters,[1] notwithstanding the fact that many of them – indeed, most of them – have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally than other

[1] Since commencement of the suit, the strip search procedure has been altered to make it less intrusive. Detainees no longer are required to squat and cough, and they may wear a robe during the search, though the officials still inspect all parts of their body. The issue before us, however, is the reasonableness of the searches as they were conducted, not the reasonableness of the newly revised policy.

youths their age.[2]

Given the uniquely invasive and upsetting nature of strip searches, it is not surprising that with the exception of the prison setting, *see Covino v. Patrissi*, 967 F.2d 73, 76-80 (2d Cir. 1992), we have never found that a strip search in the absence of any individualized suspicion was reasonable. Even in the context of lawful detention and confinement, we have recognized constitutional limits on the state's authority to conduct strip searches – limits that the majority disregards in the present case. In *Weber v. Dell*, 804 F.2d 796, 804 (2d Cir. 1986), we held that reasonable suspicion was required in order to strip search a defendant arrested and detained for misdemeanors. We reached this holding even assuming the correctness of a sheriff's assertion that seventy percent of such arrestees possessed contraband. *Id*. at 802 (finding that even if such a statistic were proven, it did not provide the particularized suspicion required by the Constitution to justify a strip search). Furthermore, in *Weber*, we did not state that a strip search of a felony arrestee, in the absence of individualized suspicion, would be lawful; rather, we suggested that, among other things, the nature of the offense for which the felony arrestee is detained furnishes the individualized suspicion required to justify the search. *Id*. We have applied and affirmed *Weber*'s restrictions on strip searches in numerous cases. *See Shain v. Ellison*, 273 F.3d 56, 62-66 (2d Cir. 2001); *Wachtler v. County of Herkimer*, 35 F.3d 77, 81-82 (2d Cir. 1994); *Walsh v. Franco*, 849 F.2d 66, 68-69 (2d Cir. 1988). As the majority notes, all of the circuits considering the issue of strip searches of adults confined for minor offenses have

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[2] According to the defendants, ninety percent of the female juvenile detainees have suffered "some form of abuse or neglect," and sixty-two percent have screened positive for mental health conditions requiring further evaluation. Seventy-five percent have been diagnosed with "significant emotional difficulties."

reached the same conclusion. *See ante*, at **[14-15]**.

In three other cases not discussed by the majority, we have likewise held that at least some individualized suspicion is necessary in order to justify a strip search, even where the government demonstrated a special need. *See Sec. & Law Enforcement Employees, Dist. Council 82 v. Carey*, 737 F.2d 187, 209-10 (2d Cir. 1984); *M.M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979) (per curiam); *United States v. Asbury*, 586 F.2d 973, 975-77 (2d Cir. 1978).

Anker involved a strip search of a student conducted by a teacher. Our decision foreshadowed the advent of the special needs doctrine by recognizing, in the context of searches performed at schools, that school administrators are entitled to "greater flexibility" with regard to Fourth Amendment concerns because of the "unique relationship [teachers have] to their students, both in administering discipline as part of their educational function, and in protecting the well-being of all children in their care and custody." *Anker*, 607 F.2d at 589. Nevertheless, we held that "when a teacher conducts a highly intrusive invasion such as the strip search in this case, it is reasonable to require that probable cause be present." *Id*. Thus, even in a school setting where special needs permit some searches in the absence of probable cause, our caselaw only allows strip searches when there is probable cause.

In *Carey*, 737 F.2d at 192, the plaintiffs subjected to strip searches were corrections officers searched pursuant to a policy authorizing random, suspicionless searches for the purpose of detecting and deterring contraband smuggling. Although we acknowledged that the officers had a diminished expectation of privacy largely due to the nature of their work, *id*. at 202, and although we recognized the important governmental interest in "maintaining prison security and preserving internal order and discipline," *id.*, we nonetheless held that some individualized

suspicion of possession of contraband was necessary to justify a strip search of the officers. *Id*. at 203-04.

Similarly, in *Asbury* we held that strip searches conducted at national borders must be premised on some measure of individualized suspicion and that "the suspicion should be substantial enough to make the search a reasonable exercise of authority." 586 F.2d at 975-76.

Although we recognized that the government's asserted special needs justified a relaxation of the probable cause standard in each of these cases, we nonetheless held that at least some individualized suspicion was needed to conduct a strip search.

The only exception to this principle that we thus far have recognized is an exception for prison inmates, *see Covino*, 967 F.2d at 76-80, which the plaintiffs – who have never faced any criminal charges – indisputably are not. Thus, to hold that the strip searches of the two girls in the instant appeal were reasonable is equivalent to saying that these girls are entitled to the same level of Fourth Amendment protection as prison inmates held on felony charges, and to decidedly less protection than people crossing the border, jail inmates detained on misdemeanor charges, prison corrections officers, or students in public school.

The majority opinion cites many cases upholding reasonable searches under the special needs doctrine, but none of these cases is remotely comparable to the case at hand, because – with the exception of cases in the prison context – none involved strip searches. *See Earls*, 536 U.S. at 838 (upholding student drug tests); *Vernonia Sch. Dist v. Acton*, 515 U.S. 646, 664-65 (1995) (same); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (upholding employee drug tests); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619, 634

(1989) (same); *O'Connor v. Ortega*, 480 U.S. 709, 728-29 (1987) (plurality opinion) (establishing a reasonableness standard, instead of a probable cause standard, for searches of public employees' personal papers); *New Jersey v. T.L.O.*, 469 U.S. 325, 347-48 (1985) (upholding a search of a high school student's purse). The majority suggests that one case, *Roe v. Marcotte*, 193 F.3d 72, 78 (2d Cir. 1999), is "[e]specially pertinent," *ante* at 12, but that case is not pertinent at all, as it involved blood tests of convicted adult sex offenders held in prison. *See Roe*, 193 F.3d at 74. The non-prison cases relied upon by the majority involve, at their most intrusive, suspicionless drug testing of students or employees. In all of these cases, however, the person subjected to the drug test had *voluntarily* undertaken the job or activity that required testing. *See, e.g.*, *Earls*, 536 U.S. at 831-32 (finding that students voluntarily engaged in extracurricular activities). More importantly, the drug tests never required anything as "highly intrusive," *Rivera* F.2d at 607, as inspection by state officials of the plaintiff's naked body. The majority does not rely on *any* non-prison case upholding strip searches in the absence of particularized suspicion, because, of course, no such case exists.

While the majority overstates the relevance of the above-mentioned cases, it downplays the significance of the most closely analogous case it cites, *Justice v. City of Peachtree City*, 961 F.2d 188, 193 (11th Cir. 1992). In *Justice*, the police detained two juveniles for loitering and truancy. At the police station, officers subjected one of them to a strip search. The Eleventh Circuit agreed with the defendants that "a detention center, police station, or jail holding cell is a place 'fraught with serious security dangers.'" *Id.* at 193 (quoting *Wolfish*, 441 U.S. at 559). However, because strip searches were such a "serious intrusion upon personal rights," *id*. at 192,

the court found that searches also had to be justified by the presence of individualized suspicion. *Id.* at 189 ("[L]aw enforcement officers may subject a juvenile who is lawfully in custody to a strip search based upon reasonable suspicion that the juvenile is concealing a weapon or contraband."). The court explained: "We must determine whether the officers, based on the totality of the circumstances, had a particularized and objective basis for suspecting the particular person[] [searched] of criminal activity." *Id*. at 193 (alterations in original) (citation and internal quotation marks omitted); *see also id*. at 194 (considering six reasons reasonable individualized suspicion existed in that case). Though the instant case occurred outside of the law enforcement context, I would nevertheless follow the Eleventh Circuit's rationale and hold that reasonable suspicion must be present in order to strip search a juvenile who is not alleged to have committed a crime.

B.

I turn next to the government's concerns assertedly motivating the searches and the efficacy of the searches in meeting those concerns. The majority argues that the government's special needs are even more compelling in the context of juvenile detention facilities than they are in cases involving public schools or correctional facilities. I agree. However, it is not enough for the government simply to assert a compelling special need. Our special needs jurisprudence generally has also required that the search "seek a minimum of intrusiveness coupled with maximal effectiveness so that the search[] bear[s] a close and substantial relationship to the government's special needs." *United States v. Lifshitz*, 369 F.3d 173, 186 (2d Cir. 2004) (internal quotation marks omitted). This is not to say that the Fourth Amendment requires that

only "least intrusive means" be used in order to effectuate the government's interests, but a "close and substantial relationship" between the intrusiveness and the need must be demonstrated nevertheless. *Id*. at 184, 186 (citation and internal quotation marks omitted). The government bears the burden of demonstrating this nexus between the search and the asserted special need. *See Bell v. Manson*, 590 F.2d 1224, 1226 (2d Cir. 1978).

The government here has completely failed to demonstrate that the invasive strip searches bore a "close and substantial" relationship to any governmental need. This first becomes clear upon examining the thirty-four "event reports" for the years 1995 through 2000 produced during discovery. The reports describe the occasions on which officers discovered contraband in the possession of the detainees. Of the thirty-four reports of contraband violations, thirty-two describe contraband that either (1) was discovered through a search that was less intrusive than a full strip search; (2) could have been discovered through a search that was less intrusive than a full strip search; or (3) could have been discovered through a policy that allowed strip searches only in cases of individualized suspicion. With regard to the remaining two reports, it is unclear whether a strip search was necessary for discovery of the contraband; it is also unclear if individualized suspicion existed. Thus, the detention centers' own documentation of contraband discoveries provides absolutely no evidence that suspicionless strip searches were necessary, or even helpful, in any case.

Other evidence in the record confirms the weakness of the government's arguments. One supervisor testified that of the one hundred strip searches she personally conducted, not one

yielded evidence of contraband. A director of one of the facilities testified that out of 2,500 strip searches performed since that facility was built, only two strip searches revealed contraband that otherwise would not have been found. Those two recovered items of contraband were a piece of jewelry attached to a child's belly button and cocaine that was discovered in a child's clothing. Full nudity would not have been necessary to uncover these items.[3]

The majority accepts the government's argument that strip searches serve the "special need" of deterring children from smuggling contraband. I agree that, under certain circumstances, deterrence can be a legitimate special need that will justify some suspicionless searches. *See Von Rabb*, 489 U.S. at 674, 675 n.3; *Wolfish*, 441 U.S. at 559. However, the deterrence rationale is not very compelling in this case, particularly when balanced against the degree of the invasion of privacy. While deterrence may be an important rationale for employees who know they will undergo drug tests, *see Von Rabb*, 489 U.S. at 674, 675 n.3, or for prisoners returning from contact visits with outsiders, *see Wolfish*, 441 U.S. at 559, it has little applicability to a person who does not expect to be detained and subjected to a search. *See Hunt v. Polk County, Iowa*, 551 F. Supp. 339, 344 (S.D. Iowa 1982) (observing that even though a "rationale

[3] The government's brief cites additional incidents of the discovery of contraband to justify the strip searches, but the facts surrounding those incidents do not demonstrate the necessity of full strip searches in the absence of individualized suspicion. For example, the government's brief discusses a girl with a history of self-mutilation who concealed a diaper pin in her bra. The government's brief fails to mention, however, that (1) the pin was not discovered during a strip search, and (2) a policy of allowing full strip searches only when based on individualized suspicion would have been sufficient to discover the diaper pin, given that officials had already learned of the girl's self-destructive tendencies by observing her arms and ankles.

for upholding strip searches in [some] cases is that prisoners' awareness of the across-the-board policy will deter them from attempting to smuggle contraband when their next opportunity arises, . . . [t]he deterrence rationale . . . has little applicability to a person arrested unexpectedly on the street"); *see also John Does 1-100 v. Boyd*, 613 F. Supp. 1514, 1523 (D. Minn. 1985) (finding that "arrest and confinement . . . are wholly unplanned events, so that the defendants' strip search policy can hardly be expected to deter smuggling"). In Connecticut's juvenile detention centers, it is common for children to be arrested unexpectedly and confined immediately. Trial Tr. at 127-28. In other cases the juveniles are brought first to their parents, who then must bring them to court. Even in those cases, however, the child does not necessarily expect to be detained, as prosecutors do not seek to have the child detained in all cases.[4] *Id.* at 129. The deterrence rationale might make some sense for re-entry searches, given that the detention and the searches are foreseeable by the detainee in those circumstances; however, the majority concedes that re-entry strip searches are unlawful. In any case, even in the limited circumstances where the deterrence rationale could apply, the government has made no showing that a full strip search – rather than other methods of searching – is necessary to achieve the desired deterrent effect.

The evidence regarding the efficacy of strip searches in detecting child abuse is even

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[4] In the case now before us, T.W. testified that she had not expected to be sent to detention even though she had been brought to court. As for S.C., her testimony does not suggest that she knew of the strip search policy before she arrived at the detention center for the first time; nor does the record clearly establish that she knew the police were coming to detain her on the first two occasions that they did so. (On the third occasion, she turned herself in.) Moreover, detention facility officials did not strip search S.C. after her single private visit with outsiders, even though that is precisely the sort of circumstance in which the deterrence rationale for strip searches would seem to apply with the most force.

more scant than the evidence of contraband discovered during strip searches. The record contains over twenty-five reports of suspected abuse filled out by center employees. In each report, the employee is asked to "describe the circumstances in which the injury(ies), maltreatment or neglect came to be known to the reporter." Not a single report indicates that a full strip search was the source of the evidence of abuse. Moreover, while the majority opinion cites to evidence establishing a high rate of self-mutilation among detainees, I am not aware of any evidence in the record discussing the rate at which abuse is discovered during a strip search that otherwise would not have been discovered.

In criticizing the government's evidence, I again emphasize that the question is not whether the government's concerns justify a potentially-invasive search of some kind – such as a frisk search or a thorough search of all of a detainee's clothes and possessions – in the absence of individualized suspicion. Nor is the question whether the government's concerns justify a full strip search when there is some reasonable suspicion that a particular juvenile possesses contraband. The question instead is whether the government's concerns are sufficiently credible and sufficiently weighty to justify a highly degrading, intrusive strip search absent any individualized suspicion that the particular young adolescents ordered by the state to disrobe possess contraband. To that question, I would respond in the negative.

I would indicate, however, that the amount of individualized reasonable suspicion that would justify a strip search may be lower in these circumstances than in most contexts. It is my belief that, in most instances, the detention facilities would be able to conduct a strip search if the

authorities first gathered information about the juvenile's medical or criminal history, questioned the juvenile about any history of abuse or suicide, and uncovered the circumstances surrounding his or her immediate detention. Such information, I believe, usually would provide the government with reasonable individualized suspicion to conduct the search.

Indeed, it is likely that in the case before us, the officers conducting the strip searches would have had a reasonable, individualized suspicion justifying the strip searches had they bothered to investigate the plaintiffs' personal histories and present circumstances. The appellees note that the plaintiffs were potentially suicidal, and that S.C. had been a "substantial user of narcotics." If the juvenile detention centers had performed the strip searches at issue based on reasonable, individualized suspicions rooted in the dangerous tendencies of the plaintiffs, I might not question their authority to do so. But this question is not before us. The district court made no findings as to what the officials knew or what information was available to them at the time of the search,[5] and the appellees do not argue to us that the searches were based on reasonable suspicion; their arguments on appeal are only that the searches were reasonable even in the absence of any individualized suspicion. We cannot employ hindsight to determine whether the searches at issue here were reasonable. If the information causing reasonable suspicion was unknown or irrelevant to the person performing the search, it is not part of our determination of "reasonableness" under the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)

[5] The officers did ask limited questions before some of the searches, but the record reveals few details about the content of these questions. There is nothing to suggest that the questions played any role in the decision whether to conduct a strip search.

("[I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?") (internal citation omitted); *Beck v. Ohio*, 379 U.S. 89 (1964) (holding seizure under Fourth Amendment reasonable if the facts known to the officer at the time of arrest would warrant the belief of a prudent person that the arrestee had committed or was committing a crime); *Weber*, 804 F.2d at 798 (refusing to entertain argument that reasonable suspicion existed to strip search the plaintiff, a misdemeanor arrestee, because, *inter alia*, defendants "concede that pursuant to jail policy a jail employee undertook a strip/body cavity search . . . in the absence of any ground other than her status as an arrested person").

It is too much of a departure from our prior cases and too great an extension of the special needs doctrine to say that any of the strip searches at issue here were justified absent individualized suspicion. Because I believe that the entry searches, like the re-entry searches, do not "fit within the closely guarded category of constitutionally permissible suspicionless searches," *Chandler v, Miller*, 520 U.S. 305, 309 (1997), I respectfully dissent from the majority's finding that the first, fourth, and eighth strip searches of S.C. and the first strip search of T.W. were lawful.